IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE,

Appellant,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Appellees.

No. 10,347

196

MARY E. DOBLE,

Appellant,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,

Appellees.

No. 10,348

197

CONSOLIDATED OPENING BRIEF ON BEHALF OF APPELLANTS.

AARON M. SARGENT,
Hobart Building, San Francisco,
Attorney for Appellants.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Introductory statement	1
Condition of the record	2
Jurisdictional statement	3
STATEMENT OF THE CASE	3
Legal right to consolidate	5
Unlawful consolidation agreement	6
Unlawful solicitation of proxies	8
False statements in Mortimer Fleishhacker letter	10
Fraudulent notice of shareholders' meeting	13
Second count—Damages for failure to give notice of redemption rights under 12 USCA 34a	15
Special trusts created to conceal sub-standard assets in the Anglo & London Paris National Bank	18
Herbert Fleishhacker overdraft	18
Loans of R. Stanley Dollar	18
General indebtedness of Herbert and Mortimer Fleishhacker	18-19
Credit accommodations involving other directors	19
More than 100 per cent of capital used to support officers' and directors' loans	20
Third count—Damages for publication of untrue condition report of the Anglo & London Paris National Bank	21
Representation that balance sheet was true—stockholders of Anglo California Trust Company induced to join in the plan	22
A false balance sheet concealing $6,500,000 in sub-standard assets	23
Directors knowingly permitted violation of statute	23
Denicke relied upon untrue condition report	23
Measure of damages	24
Allegations suspending statute of limitations	25
Concealment	26
Wilful failure to disclose material facts	26

Pages

Overt acts involving concealment....26-28
Confidence reposed in defendants.... 28
Denial of access to bank records.... 28
Conspiracy to shield defendants by suppressing records 28-30
Active concealment—denial of existence of liability.... 30
Manner in which causes of action were discovered.... 30
Fiduciary obligations of defendants.... 32
Common law liability in addition to case arising under federal law 33

QUESTIONS INVOLVED—HOW RAISED.... 30
Motions to dismiss 35
Reference to judgments 35
JOINT SPECIFICATIONS OF ERROR....35-37
ADDITIONAL SPECIFICATIONS OF ERROR ON BEHALF OF ERNEST H. DENICKE....37-38

ARGUMENT

Outline of argument 38-39
General jurisdiction of the District Court.... 39
A cause of action created by federal statute.... 42
A duty imposed by a federal statute.... 45
The interpretation of a federal statute.... 50
Matters of record disclosing that interpretation of federal statute is necessarily involved.... 56
A miscarriage of justice resulting from failure of the District Court to take jurisdiction and decide all questions presented 58
A cause of action for fraud—aside from the violations of statute 60

Page

Knowledge of law—presumption not available to show actual knowledge of legal rights 62

Damages for fraudulently inducing a forfeiture of legal rights 66

Statute of limitations not available as a defense 70

Effect of decision in National Supply Company v. Stanford University, 134 Fed. (2d) 689 70

Comptroller of the Currency had no power to sanction or validate the fraud 72

Condition of the record as to J. C. McKinstry 72

Conclusion 73

APPENDIX

Analysis of 12 U. S. Code, Section 34a i

Analysis of statutes defining powers and duties of the Comptroller of the Currency iii

Comparison of consolidation agreement in National Supply case with contract made by the Anglo on June 30, 1932 .. viii

Stipulation in Denicke v. Brigham, No. 10347, concerning status of J. C. McKinstry xiv

Stipulation in Doble v. Buck, No. 10348, concerning status of J. C. McKinstry xix

Table of Authorities Cited

Cases

	Pages
Bailey v. Mosher, 63 Fed. 488	45
Baldwin v. Chicago & Northwestern Railway Co., 86 Fed. 167	56
Benedict v. City of New York, 247 Fed. 758	56
Benton v. Deininger, 21 Fed. (2d) 657	45
Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162	64
Bowman v. Payne, 55 Cal. App. 789	69
California Bank v. Kennedy, 167 U. S. 362	52
Chesbrough v. Woodworth, 244 U. S. 72	41, 42
Chicago Life Insurance Co. v. Needles, 113 U. S. 574	56, 59
Cohens v. Virginia, 6 Wheat. (19 U. S.) 264	51, 74
Copper Process Co. v. Chicago Bonding & Insurance Co., 262 Fed. 66	62
Deming v. Carlisle Packing Co., 226 U. S. 102	56
Douglass v. Todd, 96 Cal. 655	69
Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282	55
Fauntleroy v. Lum, 210 U. S. 230	55
Federal Reserve Bank of Atlanta v. Atlanta Trust Co., 91 Fed. (2d) 283	54
Fleishhacker v. Blum, 109 Fed. (2d) 543	61
Fox v. Hale & Norcross Co., 108 Cal. 369	70
Freiburg Company v. Dawson, 274 Fed. 420	56
Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044	62
Glindemann v. Ehrenpfort, 29 Cal. App. 87	24
Goodenow v. Ewer, 16 Cal. 461	69
Grand Trunk Rwy. v. Lindsay, 233 U. S. 42	44
Gully v. First National Bank, 299 U. S. 109	51
Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278	74

Pages

Johnson v. Southern Pacific Co., 196 U. S. 1 47
Jones v. Missouri-Edison Electric Co., 144 Fed. 765 62
Jones National Bank v. Yates, 240 U. S. 541 44

Kavanaugh v. Kavanaugh Knitting Co., 123 N. E. 148, 226 N. Y. 185 61
Kimball v. Pacific Gas & Electric Co., 30 Pac. (2d) 39, 220 Cal. 203 70

MacDonald v. Reich & Lievre, Inc., 281 Pac. 106, 100 Cal. App. 736 70
Macon Grocery Co. v. Atlantic Coast Line Railroad Co., 215 U. S. 501 48
McDonald v. DeFremery, 168 Cal. 189 62
Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 171 N. E. 75, 68 A. L. R. 1376 65
Murphy v. Sheftel, 121 Cal. App. 533, 9 Pac. (2d) 568 64

National Supply Company v. Stanford University, 134 Fed. (2d) 689 ..... 70, A. viii

Osborne v. Bank, 9 Wheat. 738 49

Portland Railway Co. v. City of Portland, 210 Fed. 667 56

Rued v. Cooper, 119 Cal. 463 68

Schlemmer v. Buffalo, Rochester, etc. Ry., 205 U. S. 1 47
Siler v. Louisville & Nashville RR Co., 213 U. S. 175 ..... 54, 59
Spreckels v. Gorrill, 152 Cal. 383 24

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548 48
Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 47
The Fair v. Kohler Die Company, 228 U. S. 22 ..... 55, 59
Thomas v. Taylor, 224 U. S. 73 ..... 42, 44
Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 49

Wyman v. Wallace, 201 U. S. 230 43

Yates v. Jones National Bank, 206 U. S. 158 42

Codes and Statutes

	Pages
Civil Code, Sec. 1576	69
Civil Code, Sec. 1578	69
Civil Code, Sec. 1710	61, 69
Code of Civil Procedure, Sec. 1963	64
12 USCA 1	A. iii
12 USCA 21	A. iii
12 USCA 22	A. iv
12 USCA 23	A. iv
12 USCA 27	A. iv
12 USCA 30	A. iv
12 USCA 33	A. v
12 USCA 34	2, 3, 5, 15, 17, 34, 36, 46, 56, 57, 62, 63, A. i, v, vi
12 USCA 35	A. v
12 USCA 36	A. iv
12 USCA 51	A. iv
12 USCA 51a	A. iv
12 USCA 51b	A. iv
12 USCA 53	A. iv
12 USCA 56	41
12 USCA 57	A. iv
12 USCA 58	A. iv
12 USCA 59	A. iv
12 USCA 60	41
12 USCA 63	43
12 USCA 93	3, 15, 22, 33, 36, 37, 38, 41, 44, 46, 56, 57
12 USCA 161	3, 20, 22, 23, 34, 37, 38, 41, 44, 56
12 USCA 501a	3, 22, 33, 37, 38, 41, 56
12 USCA 548	51
28 USCA 41(1)	3, 38, 40, 42
28 USCA 225(a)(d)	3
28 USCA 230	3
United States Constitution, Art. III, Sec. 2	53

Texts

California Jurisprudence "Fraud & Deceit", Volume 12, Sec. 88	24
Corpus Juris "Evidence", Vol. 22, p. 148	63
Corpus Juris "Fraud", Volume 22, Sec. 243	24
Corpus Juris Secundum "Actions", Volume 1, at page 990	46
Pomeroy's Equity Jurisprudence, Fourth Edition	66, 67, 68

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ERNEST H. DENICKE,
Appellant,

vs.

R. D. BRIGHAM, WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, MORTIMER FLEISHHACKER, JR., WALTER A. HAAS, WILLIAM F. HUMPHREY, SAMUEL KAHN, J. C. MCKINSTRY, JOSEPH HABER, JR., WILLIAM B. REIS, LEON SLOSS, JR., ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Appellees.

} No. 10,347

MARY E. DOBLE,
Appellant,

vs.

WALTER E. BUCK, R. STANLEY DOLLAR, HERBERT FLEISHHACKER, MORTIMER FLEISHHACKER, WALTER A. HAAS, WILLIAM F. HUMPHREY, J. C. MCKINSTRY, ALFRED B. SWINERTON and JOSEPH O. TOBIN,
Appellees.

} No. 10,348

CONSOLIDATED OPENING BRIEF ON BEHALF OF APPELLANTS.

INTRODUCTORY STATEMENT.

These are damage suits which arose out of a consolidation proceeding completed on June 30, 1932. The Anglo

California Trust Company, a State bank, was merged into The Anglo & London Paris National Bank of San Francisco, a National banking association, under the provisions of 12 USCA 34a. Ernest H. Denicke and Mary E. Doble were, respectively, shareholders of the state and national banks participating therein. The merger resulted in the formation of the present bank, which is known as The Anglo California National Bank of San Francisco.

The defendants were directors of the constituent banks before June 30, 1932. Appellants were defrauded of their right, as minority shareholders, to obtain an appraisal and payment of the value of their shares. This conduct is alleged to be in violation of the federal act under which the consolidation was accomplished.

Condition of the record.

These actions were not consolidated in the District Court. There are separate notices of appeal—with a separate record in each case. There are certain questions of law that are in common. There has been no consolidation except for the purpose of briefing and argument.[1]

These parties each reserve their right of independent action as shown by the record. Separate mandates should issue as the court may determine in each case.

For convenience we will cite the transcript in Denicke v. Brigham et al., CCA No. 10347 as 47 R. .....; the record in Doble v. Buck, et al., CCA No. 10348 will be referred to as 48 R. ..... Unless otherwise stated, all italics and other emphasis used herein is ours.

---

[1]This court made an order July 29, 1943 granting leave to file consolidated opening and closing briefs. A copy thereof was filed in both proceedings. This brief is filed as a brief in both cases.

JURISDICTION.

The District Court declined jurisdiction,—disregarding federal questions apparent on the face of the record. Dismissals were granted on motion. We appeal from such rulings. Original jurisdiction is sustained by 28 USCA 41(1).

The liabilities result from violations of 12 USCA 34a, the federal statute governing this merger. In the Denicke case there is a further ground to support the jurisdiction —the complaint states a case based on the publication of untrue condition reports in violation of 12 USCA 161 and 324.

The defendants are bank directors. Their liability is based upon 12 USCA 93 and 501a. These sections are respectively a part of the National Bank Act and the Federal Reserve Act.

This court has jurisdiction on appeal under 28 USCA 225(a)(d). Appeal was taken within the period of three months allowed by 28 USCA 230. Judgments in both suits were entered May 15, 1942. Notices of appeal were filed August 12, 1942.[1a] The time did not expire until August 15, 1942.

STATEMENT OF THE CASE.

This consolidation was possible because of authority granted in a federal statute, to-wit: 12 USCA 34(a), which provides:

[1a]In the Denicke matter, judgment is at 47 R. 97, and notice of appeal is at 47 R. 99. In the Doble matter, the corresponding documents will be found at 48 R. 76 and 78, respectively.

> "Any bank incorporated under the laws of any State * * * may be consolidated with a national banking association located in the same State * * * under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding * * *."

Congress included the following terms to protect the minority stock:

> "* * * any shareholder of either the association or the State or other bank so consolidated, who has voted against such consolidation at the meeting of the association of which he is a stockholder, or has given notice in writing at or prior to such meeting to the presiding officer that he dissents from the plan of consolidation, *shall be entitled to receive the value of the shares* so held by him if and when said consolidation shall be approved by the Comptroller of the Currency, such value to be ascertained as of the date of the Comptroller's approval by an appraisal * * * and *the value as ascertained by such appraisal * * * shall be deemed to be a debt due* and shall be forthwith paid to said shareholder *by said consolidated association,* and the shares so paid for shall be surrendered and, after due notice, sold at public auction * * *."

The defendants are charged with infringing rights granted by this part of the statute. There was a binding allotment of stock—all shareholders were compelled to submit to an exchange. The proceeding was so handled

as to impose a default and loss of statutory rights upon all parties affected.

As a result of this default, the shareholders lost their right to demand payment from the consolidated bank. There was no opportunity to surrender stock and obtain the redemption price. We therefore sued for the net amount of the loss. Appellants received depreciated stock in the new bank. The value thereof is credited against the amount that would have been paid by an exercise of redemption rights under 12 USCA 34a. The difference, plus interest, represents the loss sustained.

The defendants are the directors who brought about the merger with knowledge of the violations of statute that were involved.

Legal right to consolidate.

The charters of these banks contained no provisions authorizing merger or consolidation with any other concern. The State law was not applicable because one bank was a national association, created under an Act of Congress. There was no federal statute until February 25, 1927.

On that date Congress amended the National Bank Act, adding a new section to permit the merger of a State bank with a national association.[2] This is the statute which is before us for interpretation. *We are considering a consolidation which could only be accomplished with the aid of its provisions.*

---

[2]Act of Feb. 25, 1927, Chap. 191, 44 Stat. 1225, entitled "An Act to Further Amend the National Banking Laws and the Federal Reserve Act and for Other Purposes". Section 3 of this statute contains the provisions which now appear as 12 USCA 34(a).

Overt acts constituting violation of 12 USCA 34a, the Act permitting consolidation.

For convenience we will present argument on this point by referring to the pleadings in the Denicke suit. There is a direct charge of the violation of federal statute, in the following respects:

1. **Unlawful agreement for consolidation.** The contract is attached to the complaint as an exhibit (47 R. [illegible]). It contains the following terms, inserted *to compel all stockholders to submit to an exchange*, in case of approval by a two-thirds vote.

> "Section 1. The Anglo & London Paris National Bank of San Francisco and Anglo-California Trust Company *are hereby consolidated* under the charter of the first named bank * * *.
>
> "Section 3. * * * The amount of the capital stock of the consolidated association shall be $10,400,000, divided into 520,000 shares of $20 each, * * *
>
> "Section 4. Of the capital of the consolidated association, 400,000 shares *shall be allotted* to the present shareholders of the Anglo & London Paris National Bank of San Francisco, being four shares of $20 par value for each share of $100 par value now held by them, and 120,000 shares *shall be allotted* to the present shareholders of Anglo-California Trust Company, being eight shares of $20 par value for each share of $100 par value now held by them.
>
> "Section 8. This consolidation shall *become effective when it shall have been ratified and confirmed by the affirmative vote of the shareholders* of each of said associations *owning at least two-thirds of its capital stock* outstanding, at a meeting to be held pursuant to a call of the Directors heretofore made,

and shall have been approved by the Comptroller of the Currency of the United States."

There was a binding allotment. The conversion of the old stock used up the exact number of shares authorized for the new bank.[3] There was no intention to adopt 12 USCA 34a by implication. The contract contained no saving clause for dissenters. No man could read this agreement and discover that he had a right to do anything except turn in his certificates on an exchange.

The bank did not intend to recognize the right to do anything else. This is quite apparent because the draftsman incorporated parts of the statute which were for the benefit of the bank, and omitted those clauses which would have protected the minority.[4]

---

[3]The Denicke complaint shows that before the merger there were 15,000 shares of Anglo Trust Company outstanding, to be exchanged for 120,000 shares in the new bank, the basis of exchange being 8 for 1; and that 100,000 shares in the Anglo London Paris Bank were exchanged for 400,000 in the new bank on a 4 to 1 basis (47 R. 7). Similar allegations appear in the Doble Complaint (48 R. 6). The authorized capital of the new bank was 520,000 shares.

[4]Under 12 USCA 34a there is an automatic right of succession to corporate property:

> "All the rights, franchises, and interests of each of such constituent banks * * * in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, *shall be deemed to be transferred* to and vested in such consolidated national banking association *without any deed or other transfer* * * *"

It was unnecessary to include anything in the contract to this effect. However, the bank wanted to adopt this clause, and it did not want to assume the burden of the redemption provision. The framers included the following:

> "All assets of the Anglo & London Paris National Bank of San Francisco and Anglo California Trust Company at date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities * * *" (47 R. 54, 48 R. 53).

To obtain relief, it was impossible for a shareholder to act under this agreement. *It was necessary for him to break it.*

2. Unlawful solicitation of proxies. On June 24, 1932, these banks held special shareholders' meetings to approve the consolidation plan.[5] Proxies were solicited in violation of 12 USCA 34a. The following literature was used:

(a) Letter signed by the president, explaining terms of the consolidation (Denicke complt. Exb. B, 47 R. 60); see also Doble record, 48 R. 62.[6]

(b) Form letter for surrender of stock certificates (Denicke compl. Exb. B at 47 R. 63-64). See Doble record at 48 R. 65-66.[7]

(c) Legal notice of special meeting called to approve consolidation (Denicke compl. Exb. C, 47 R. 65). See Doble record at 48 R. 61.[8]

---

[5]47 R. 11, 48 R. 8.

[6]Letters were sent to stockholders by Mortimer Fleishhacker and Herbert Fleishhacker, who were respectively the President of Anglo California Trust Company and The Anglo & London Paris National Bank. These letters are identical in form with the exception of the signature, etc.

[7]This letter for surrender of shares was one of the documents that accompanied the president's letter. The same form of instructions for surrender of certificates was used in both banks. The only difference has to do with the name of the bank and the ratio specified as the basis for surrender.

[8]These notices of meeting are identical except as to the name of the bank affected, the name of the officer signing the notice, and the place of meeting. The notice given to shareholders of the Anglo & London Paris National Bank called for a meeting at No. 1 Sansome Street on June 24, 1932 at 2:30 P.M. (48 R. 61). The notice to shareholders of Anglo Trust Co. called for a meeting across the street (at 532 Market Street) one hour later (47 R. 65). Mortimer and Herbert Fleishhacker were officers and directors of both banks. It was possible for them to hold meetings on both sides of the street the same day.

(d) Proxy in favor of the management to be voted in favor of the consolidation (Denicke compl. Exb. D, 47 R. 65-66). See Doble record 48 R. 66-67.[9]

The stockholders did not get a copy of the contract. They did not receive a copy of the statute. They were given nothing to indicate the existence of redemption rights. The pleading so states.[10] They could have taken these papers to an attorney and remained in ignorance unless a man was selected who had special training in the law of consolidation proceedings. There was nothing to indicate the possibility of a separate remedy by statute. The proceeding was referred to as one conducted under "*the laws of the United States*" (see Notice of Meeting, 47 R. 65). *The bank did not say what law it was.* There was no citation. Nothing to enable a stockholder to find the statute or discover what it contained.

No one except the directors ever saw the contract. They are the men who signed it. It was supposed to be on file *at the bank* (47 R. 65). Mr. Denicke and Mrs. Doble had the technical right to go down and ask for it. They did not see it. If they had done so they would not have found the exact provision of law upon which their rights depended. The agreement refers to an act approved No-

---

[9]The same form of proxy was used for both banks. The only difference consisted in names, time and place of meeting, and identity of proxy holders. Mortimer Fleishhacker was named as one of the proxies for the shareholders of Anglo California Trust Company. There was no blank space to permit the stockholder to write in the name of anyone else.

[10]Denicke Compl. Par. IX, sub. 5, 47 R. 16. In the Doble case the same facts are shown by affidavit, 48 R. 46. There was a minute entry incorporating these facts in the pleading as an amendment. 48 R. 71.

vember 7, 1918 (47 R. 49). *A layman could form no intelligent opinion from such a reference.*

The literature used for the solicitation of proxies contained positive misrepresentations in violation of 12 USCA 34a.

False statements in the Mortimer Fleishhacker letter. This document is at 47 R. 60. It is a letter to stockholders written May 25, 1932, to explain the consolidation plan. It starts representing that the agreement was fair; that it was adopted to effect economy in operations. The stockholders were told that a contract had already been signed—that, in effect, their proxies were solicited *to approve of a fait accompli.* We quote:

> "* * * a special meeting of your Board of Directors was held on May 25th, at which *formal action was taken,* approving and *executing an agreement of consolidation* with The Anglo & London Paris National Bank of San Francisco * * *" (47 R. 61).
>
> "* * * your President was directed to call a special meeting of the stockholders for June 24th, *for the purpose of ratifying the action taken.*" (47 R. 61.)

There was an affirmative misrepresentation. The stockholders were given the following explanation as to their legal rights:

> "The agreement provides:
>
> 1. That the consolidation shall be effected under the national charter of The Anglo & London Paris National Bank of San Francisco, with a change of title * * *
>
> 2. That the head office shall be No. 1 Sansome Street * * *

3. It is the further intention, temporarily, to continue * * * the present head office of Anglo California Trust Co. * * *

4. That the capital shall be $10,400,000.00 consisting of 520,000 shares of a par value of $20.00 per share, *which shall be exchanged on the basis of four shares of stock of the consolidated bank for each present share of The Anglo & London Paris National Bank, and eight shares for each present share of the Anglo-California Trust Company:* * * * (then follow provisions specifying the amount of capital and surplus of the new bank).

5. * * * (Reference to a trust to be created in assets not contributed to the capital of the consolidated bank.)" (47 R. 61-62.)

This was the only "information" that the stockholders received about the plan.

This was the only "information" that was furnished. Fleishhacker recommended that the stockholders approve the exchange:

"The basis for such exchange, in the unanimous opinion of your Directors and Executives, *is eminently fair, having been arrived at after most careful consideration of all the factors;* there being many common advantages accruing to the benefit of the stockholders of both institutions." (47 R. 63.)

He said the directors had *unanimously approved it.*

"The consolidation agreement having had the unanimous approval of the respective Boards of Directors and Executives, and having been duly executed by them, it is planned to make the consolidation effective as of June 30th, 1932." (47 R. 63.)

And he called for a *surrender of stock certificates:*

> "May we, therefore, ask that you kindly execute and return the enclosed proxy at your earliest convenience, and that you endorse and forward your stock certificates to the trust department of Anglo California Trust Company, as provided in the enclosed form.
>
> Submitted by order of the Board of Directors.
> M. Fleishhacker,
> President." (47 R. 63.)

Each stockholder received a form letter to be used in surrendering his certificates. This contained the following provisions:

> "The undersigned hereby directs and authorizes you to exchange the enclosed stock for stock of The Anglo California National Bank of San Francisco * * * upon the basis of eight (8) shares of the stock of the last named bank for one (1) share of stock of Anglo California Trust Company.
>
> "The foregoing exchange is to be made *in accordance with the terms of a certain letter* dated the 25th of May, 1932, *addressed to the stockholders* of said Anglo California Trust Company, *signed by Mortimer Fleishhacker,* President, and more particularly set out in an agreement entered into between said * * * (bank) * * * and The Anglo & London Paris National Bank of San Francisco, dated May 25th, 1932." (47 R. 64.)

The complaint shows reliance upon these representations, and that damages were sustained:

> "Plaintiff was led to believe, and he did believe, in consequence of the fraud practiced upon him by

defendants, in violation of said Section 34a, that an exchange of his shares constituted his sole remedy with respect to said consolidation.

"He relied upon this belief in consequence of the trust and confidence which he reposed in the defendants herein, and *as a result of such confidence, he refrained from consulting independent counsel or otherwise making an independent investigation of his legal rights* with respect to such consolidation.

"The letter of transmittal from Mortimer Fleishhacker attached hereto induced plaintiff to believe, and he did in fact believe, that an exchange of shares constituted the only remedy available to him * * * He acted upon such belief and sustained damage, in violation of 12 U. S. Code, Sec. 34a." (47 R. 16.)

3. **Fraudulent notice of stockholders' meeting in violation of federal statute.** 12 USCA 34a includes the following provision regarding notice:

"* * * (the) agreement shall be ratified * * * at a meeting to be held on the call of the directors after publishing notice of the time, place, and *object of the meeting* for four consecutive weeks * * * and after sending such notice to each shareholder of record by registered mail at least ten days prior to said meeting * * *."

To comply with this section a notice of the "object" of a meeting must be *a true statement of the object and purpose thereof.* If the management sees fit to discuss the effect of a plan it must correctly state the consequences to shareholders who approve *and to those who do not approve.* It cannot lawfully represent that the

shareholders have no right to do anything except surrender certificates when a two-thirds vote is cast in favor.

This notice may be construed with the Mortimer Fleishhacker letter, and with the letter for surrender of stock. These papers all went out together as a part of the notice. The meeting was stated to be one held

> "* * * for the purpose of considering and determining by vote *whether an agreement to consolidate* the said bank (Anglo Cal. Trust Co.) and The Anglo & London Paris National Bank of San Francisco * * * under the provisions of the laws of the United States, *shall be ratified* and confirmed * * *." (47 R. 65.)

The agreement "to be ratified" was an illegal one calling for a compulsory allotment of shares.

Liability under the first count in both of these cases is therefore based upon the following violations of federal law:

1. An unlawful agreement of consolidation denying redemption rights.

2. A fraudulent solicitation of proxies to be voted in favor of its adoption.

3. An untrue and unlawful notice of the object of the meeting misrepresenting the effect of the plan.

The duty to refrain from such conduct will be found in Section 34a. Directors are only empowered to adopt *lawful agreements*. Any act in derogation of a right granted by this section is obviously a violation thereof. Furthermore, Congress did not intend to authorize bank

directors to commit torts or perpetrate frauds in accomplishing mergers. There is only authority to consolidate "*on such terms and conditions as may be lawfully agreed upon* * * *."

Directors are liable for a violation of this section under 12 USCA 93, which provides:

> "And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

Second Count—Damages for failure to give notice of redemption rights under 12 USCA 34a.

In deciding the questions presented in this court, we ask the court to construe 12 USCA 34a with the due process clause in the Fifth Amendment. This statute makes a drastic change in the legal rights of minority stockholders involved in a merger. It makes their investment dependent upon the will of a two-thirds majority. Whenever that number of other stockholders vote for a consolidation plan, a dissenter is faced with two alternatives, neither of which may be satisfactory to him. He may accept stock in the new bank at a basis fixed by others. He is not at the conference table when the contract is negotiated. He has no power to change the basis. A surrender of certificates is a "*take it or leave it*" proposition as far as he is concerned. There is nothing else to do unless demand can be made for payment of the value of the old stock. This remedy approximates justice if there is a reasonable opportunity to exercise it. It

may not be a satisfactory form of relief because an appraisal of stock may be required in the middle of a depression when values are below normal. An appraisal takes no account of the earning power and going concern value of a corporation. It is necessarily a figure at which its assets could be sold. It is a liquidation price.

There is no doubt that laws providing for consolidations are constitutional to the extent that a two-thirds vote of other shareholders may authorize it. However, such statutes are sustained as against the minority only on the ground that there is an optional remedy provided for those who do not agree. In the case at bar, we ask the court to construe the redemption clause in 12 USCA 34a. This statute can be sustained only by interpreting that clause in a way which will afford the benefit of due process of law to the minority group.

It is our theory of liability that some affirmative notice of this redemption right is contemplated by the statute, in order that shareholders may have an opportunity to decide between their right to a redemption and their right to an exchange of shares; that there must be a reasonable opportunity at some time and place to exercise or decide not to exercise that right; that something approximating due notice and a reasonable opportunity must be afforded. Congress did not intend to license the torts committed under the guise of this section of the National Bank Act. If the statute had been drawn *to expressly permit the management to conceal and misrepresent the facts* it would undoubtedly have been unconstitutional as a denial of due process of law. The converse is likewise

true. The act can be sustained only by reading into it the duty to carry out a fair meeting on reasonable notice. It is obvious that these questions involve the construction and interpretation of the Constitution as well as 12 USCA 34a. The complaint shows that we have pleaded a cause of action based upon that theory. Mr. Denicke alleges:

1. Ownership of property rights by virtue of his status as a shareholder in Anglo California Trust Co. before the merger (47 R. 24).

2. The constitutional right to the protection of this investment under the Fifth Amendment (47 R. 24).

3. A conspiracy by defendants acting under an unconstitutional interpretation of 12 USCA 34a to deprive Denicke of that investment (47 R. 25).

4. Actual infringement of the rights of Denicke by failure to give notice of redemption rights, by fraudulent solicitation of proxies obtained by concealment of such rights, and by failure to advise Denicke of any procedural steps necessary to prevent a default and loss of remedies under 12 USCA 34a (47 R. 25-26).

5. The holding of a special stockholders' meeting conducted in a manner to suppress all reference to the remedy available for a redemption of shares—a proceeding that gave no opportunity to exercise the privilege granted by statute (47 R. 26, Par. 5).

6. Compulsory legal action applied to force all stockholders to submit to an exchange (47 R. 27).

This count incorporates by reference the statement of overt acts appearing in the first count (47 R. 24, 27). We

allege that redemption would have been demanded if the bank had afforded an opportunity to exercise this privilege (47 R. 27).

Special trusts created to conceal sub-standard assets.

Before the merger the balance sheet of the Anglo & London Paris National Bank was loaded down with sub-standard items involving loans to officers and directors. The situation had been under criticism for a long time. This condition was mentioned repeatedly in the reports of the national bank examiners. The complaint of Mr. Denicke includes reference to the following items:

Herbert Fleishhacker overdraft.

> "* * * Herbert Fleishhacker maintained an overdraft in his commercial account with said bank, which * * * exceeded the sum of $600,000,—which said defendant was wholly unable to satisfy except by resort to the technical expedient of borrowing from such bank." (47 R. 28.)

R. Stanley Dollar.

> "R. Stanley Dollar was obligated * * * (directly in the sum of) * * * $1,173,062.19, upon indirect obligations of $502,745.95, all of which was sub-standard and under criticism by the national banking examiners * * *." (47 R. 29.)

General indebtedness of Herbert Fleishhacker and Mortimer Fleishhacker.

> "Herbert Fleishhacker was obligated to Anglo London Bank upon direct indebtedness totaling $2,518,783.24." (47 R. 29.)

"* * * he was further obligated, with Mortimer Fleishhacker, upon other loans which were classified by the national bank examiners as follows:

Wholly Owned Partnership Enterprises	$3,025,654.77
Corporations in which Mortimer and Herbert Fleishhacker were substantially interested	1,184,000.00
Liabilities of Herbert Fleishhacker	4,377,095.25
Corporations in which Herbert Fleishhacker was substantially interested	1,644,708.33
Corporations in which Herbert and/or Mortimer Fleishhacker held between 10% and 25% interests	2,140,662.91
Total	$12,372,121.26"

(47 R. 29.)

Credit accommodations involving other directors (47 R. 29-30).

Wm. F. Humphrey		
(direct)	$263,500	
(indirect)	723,500	$987,000
J. C. McKinstry		90,000
Alfred B. Swinerton		
(direct)	$ 50,000	
(indirect)	3,775	53,775
Joseph O. Tobin		100,000
Paul Shoup		606,000
Louis Sutter		63,000
T. C. Tilden		35,000
James Tyson		79,000

More than 100 percent of stockholders' investment used to support loans in which executive officers and directors were interested.

> "A total of between 100% and 150% of the capital stock of said bank was outstanding in the shape of loans to officers and directors' corporations throughout said time. An amount in excess of $6,500,000 represented impaired loans which said bank carried on its condition statement and falsely represented to be unimpaired and sound assets, all in violation of 12 U. S. Code, Sections 161 and 324." (47 R. 30-31.)

As a result of this condition, the Anglo & London Paris National Bank had at least $6,500,000 of sub-standard assets before the merger. It published a false balance sheet concealing this amount of loss (47 R. 31). It was impossible to put all of these sub-standard items into the consolidation. If the balance sheet of the new bank did not include these bad loans at face value, there would be a shrinkage. This had to be concealed in some way. The Fleishhacker management did not want to acknowledge that condition to the stockholders. It therefore proposed a consolidation plan which included special trusts to take over assets which the bank did not "*desire to carry into the consolidated association*" (47 R. 52). The agreement provided for two trusts of this character, one to be administered for the benefit of the shareholders of the Anglo & London Paris National Bank, the other for stockholders in Anglo California Trust Company. The losses in this latter bank were negligible. The real purpose of these provisions was to conceal the false condition report published by Herbert Fleishhacker's bank.

which was the national association. These trusts are set up in Section 6 of the consolidation agreement (47 R. 52).

> "Such assets of The Anglo & London Paris National Bank of San Francisco, in excess of the amount necessary to make up its contribution to capital surplus and undivided profits of the consolidated association, as * * * (said bank) * * * *shall not desire to carry into the consolidated association* shall be withdrawn from the assets of * * * (such bank) * * * and transferred by it before the effective date of the consolidation to a trustee or trustees for the ultimate benefit of the shareholders, but under the terms and conditions hereinafter set forth.
>
> "The amount so withdrawn * * * shall be held by the trustee or trustees of that association for a period of five years from the date of consolidation before making distribution to the shareholders * * *.
>
> "* * * during that period any and all of the assets so held by the trustee or trustees, and the proceeds of any cash collections therefrom, may be used to make good any losses sustained by the consolidated bank on assets taken over by it from The Anglo & London Paris National Bank of San Francisco * * *" (47 R. 52-53.)

There was a similar trust for stockholders of The Anglo California Trust Company.

Third Count—Damages for publication of untrue condition statement of The Anglo & London Paris National Bank.

Mr. Denicke had a right to know that the balance sheet of this other bank did not speak the truth. It was mate-

rial for him to know that $6,500,000 in sub-standard assets were concealed in its statement. His complaint contains a third count which pleads a cause of action on this theory. It shows the violation of 12 USCA 161 and 324, requiring the publication of true statements of condition. Directors are liable for the violation of these sections under 12 USCA 93 and 501a. A cause of action is alleged in the following terms:

Fraudulent condition statement prior to consolidation.

> "At all times between March 1, 1932, and July 1, 1932, Anglo London Bank[12] published * * * a false and fraudulent statement of its condition, in violation of 12 U. S. Code, Secs. 161 and 324. Throughout this period of time, said bank falsely, fraudulently and unlawfully represented to the public, including plaintiff, that the net amount of its unimpaired capital, surplus, and undivided profits, was a sum in excess of the true value thereof to the extent of $6,500,000." (47 R. 28.)

Representation that the balance sheet was true, inducing stockholders of Anglo California Trust Company to join in the plan.

> "The conspiracy * * * made a part of this count was engineered by * * * the defendants * * * for the purpose of relieving the officers and directors of Anglo London Bank * * * from the obligation of repaying * * * (their loans). * * * As an essential part of said conspiracy, said defendants * * *

[12]In this pleading we used the term "Anglo London Bank" as an abbreviation for "The Anglo & London Paris National Bank of San Francisco; similarly, "The Anglo California Trust Company" is referred to as "Anglo Trust Co." (47 R. 6).

represented to all of the stockholders of Anglo Trust Co., including plaintiff, that the regularly published balance sheet of Anglo London Bank was a true condition statement executed and published in compliance with * * * 12 U. S. Code Secs. 161 and 324." (47 R. 31.)

A balance sheet in violation of federal law concealing $6,500,000 in sub-standard assets.

"The report * * * published and exhibited to plaintiff and to the general public * * * was inflated to that extent and concealed this amount of shrinkage in the actual value of the assets of said bank; such shrinkage arose from various causes including in particular circumstances which were the result of the misconduct of the following defendants * * *." (47 R. 28.) (Then follows—a statement—the indebtedness mentioned above.)

Directors knowingly permitted violation of statute—liable for consequences.

"The defendants herein, who were directors of Anglo London Bank, knowingly assented to the publication of such untrue condition statement by said bank, and knowingly permitted the officers of said bank to publish such a statement." (47 R. 31.)

Reliance by Denicke on untrue condition report.

"Plaintiff acted in reliance upon the belief that the balance sheet of Anglo London Bank as published before said consolidation was a true statement thereof. The damages which he sustained and which are the subject of this action are the direct consequence of the publication of an untrue condition report * * * (by said bank)." (47 R. 33.)

Denicke has incorporated the statement of overt acts in the first count (47 R. 28, Par. XIX; 47 R. 33, Par. XXIV).

Measure of damages.

Appellants sue for the consequences of a default. They charge that there has been a loss of legal rights imposed upon them by conduct in violation of federal law. They are in the same position as a party who is not able to rescind, and who therefore files an action to recover the loss sustained by fraud. Under these conditions the damages are measured by the difference before and after the fraud. In the instant case this means the difference between the value of shares of the old banks and the actual worth of what was issued after the consolidation. The authorities sustain this method of computing the loss. See:

27 *Corpus Juris*, "*Fraud*", Sec. 243, pp. 92-94;
12 *Cal. Jur.*, "*Fraud and Deceit*", Sec. 88, pp. 843-845;
Glindemann v. Ehrenpfort, 29 Cal. App. 87;
Spreckels v. Gorrill, 152 Cal. 383.

During argument in the District Court counsel suggested that it was necessary for us to take inconsistent positions in claiming that stockholders, involved on opposite sides of the merger, could have sustained a loss in the same transaction. This does not take the facts into account.

Mrs. Doble held shares in the national bank. $6,500,000 in sub-standard assets of that bank were not put into the merger. She was supposed to have an interest in a spe-

cial trust covering that amount of property. She never received an accounting. As far as she is concerned, her interest therein proved to be worthless. In consequence, she obtained nothing out of the consolidation except depreciated stock in a new bank which took over only a part of the property.

Mr. Denicke occupies a different position. His loss was the result of an unfair basis of exchange. This provided for the issuance of 8 shares in the new bank for each share held in Anglo California Trust Company. A much higher ratio should have been adopted. The sub-standard condition of the assets of the other bank furnishes an additional reason to show that the exchange was inequitable.

Without a detailed accounting of these trusts, it is impossible to state exactly what happened. Mr. Denicke has fixed the redemption price of his shares in Anglo California Trust Company by taking the balance sheet of that bank and assuming it to be a correct statement. So far as we know, this is the fact.

Mrs. Doble alleges a redemption price based upon the exact amount per share which the bank had to pay to a shareholder in the Anglo & London Paris National Bank who discovered the fraud and made a demand in time.

Allegations suspending the statute of limitations.

We desire to make an affirmative showing that these claims are not barred. The complaints in both suits are similar in this respect. We summarize the facts pleaded by Denicke.

Concealment.

"Defendants and each of them fraudulently concealed, and caused Anglo London Bank, Anglo Trust Co. and Anglo National Bank, to conceal and suppress from plaintiff all facts and circumstances from which he might determine the nature and extent of his legal right to recover damages based upon the conspiracy which brought about the consolidation of June 30, 1932." (47 R. 36, Par. XXVI.)

Wilful failure to disclose material facts.

"Defendants caused each of the matters which are the subject of this complaint to be thus concealed and kept from the knowledge of plaintiff. This was done by defendants in order to prevent plaintiff and all other shareholders of Anglo Trust Co. from ever instituting or prosecuting any action for damages based upon said consolidation." (47 R. 36, Par. XXVI.)

Overt acts involving concealment (47 R. 36-38).

"For this purpose defendants were guilty of active concealment, particularly as to the following,—

"1. The fact that the agreement * * * was drawn intentionally in violation of 12 USCA 34a.

"2. The fact that the letter of transmittal, the notice of meeting, and the proxy solicitation made in connection therewith, were each in violation of said section.

"3. The fact that said agreement was purposely drawn so as to omit language which might incorporate by reference any minority shareholders' rights * * * that this omission was deliberate and was practiced in order to avoid giving to shareholders any notice which would give real information * * *

"4. The fact that one shareholder of Anglo London Bank had successfully maintained his right to a redemption of shares and that the other shareholders had a legal right to prosecute a claim for damages * * *

"5. The fact that the provisions for creation of special trusts * * * were in fact fraudulent devices employed to conceal the existence of a shrinkage in the balance sheet of Anglo London Bank * * * that the amount of such shrinkage exceeded the sum of $6,500,000,—and that said shrinkage had to be disclosed on the books in order to avoid further publication of an untrue condition report.

"6. After June 30, 1932, there was withheld from shareholders * * * all reference to the administration of these trusts. This was done because any reference to that subject would have led plaintiff to inquire into the nature of his rights * * * defendants believed that an inquiry into this subject would have disclosed the existence of the cause of action for damages which is the subject of this suit.

"7. By its terms the special trust * * * to be set up for the benefit of plaintiff and the other shareholders of Anglo Trust Co. * * * expired June 30, 1937. At that time it became the duty of defendants to render an accounting at a meeting of the shareholders of said bank and to then pay over any balance * * * Defendants wilfully caused Anglo National Bank to fail to account to plaintiff for said fund in order to conceal the cause of action now sued upon. Plaintiff has never received any accounting with respect to the same and he had no knowledge of the existence of such a trust until discovery of his cause of action as herein set forth."

Confidence reposed in defendants.

"Throughout the period extending from June 30, 1932, to date, plaintiff reposed confidence in the defendants herein, with respect to the consolidation proceeding which is the subject of this action. He was first advised of the fact that defendants did not intend to account, and that they were unable to account for the administration of said special trust, when he made legal demand for information with respect thereto. Such a demand was made on or about September, 1940." (47 R. 38-39.)

Denial of access to bank records—Denicke prevented from making investigation of claims.

"For a period of more than two and one-half years immediately preceding the commencement of this action, plaintiff has attempted in various ways to obtain adequate information from the books and records of Anglo National Bank in order to determine the manner in which these defendants have performed their obligations of trust owing to plaintiff as a shareholder thereof. With the exception of defendant Joseph Haber, Jr., all of the defendants joined herein were directors of said bank until approximately one year before the commencement of this suit. Plaintiff's efforts in this respect were unsuccessful and it was only after the extensive use of federal process that he uncovered facts which disclosed that he was the owner of a valid cause of action upon which to base this suit." (47 R. 39, Par. 9.)

Conspiracy to shield defendants by suppressing records.

"Throughout the period from November 7, 1938, to July 7, 1941, the following took place,—

"Defendants acted in conspiracy with Mortimer Fleishhacker and Herbert Fleishhacker and with representatives of Anglo National Bank to protect all of the defendants herein from liability to the shareholders thereof.

"As a part of this plan, defendants co-operated through the firm of Chickering & Gregory, attorneys at law, who were selected for the purpose of aiding these defendants in their efforts to escape liability. Said attorneys actively concealed all facts which were of a kind that would disclose the existence of liability. They refrained from furnishing documents or permitting the examination of records except when subjected to the use of federal process.

"Said attorneys filed deliberately false interrogatories in an action now pending in this court known as Denicke v. Anglo California National Bank, being proceeding No. 21033-S, doing so for the purpose of avoiding a disclosure of the extent to which these defendants had been guilty of breach of trust as directors of Anglo National Bank.

"Between November, 1938, and October 19, 1939, the said Chickering & Gregory acted as counsel of record for William B. Reis, Samuel Kahn, Leon Sloss, Jr., each of whom are defendants herein, also for other directors of Anglo National Bank. Appearance in that capacity was made by said attorneys in actions Nos. 21033-S and 21161-R, now pending in this court.

"Said attorneys have now attempted to change their position and are attempting to represent said bank and at the same time to protect the interests of the directors of such bank in order to relieve the latter of the obligation to answer in damages for

losses imposed by such directors upon Anglo National Bank * * *." (47 R. 39-40.)

Active concealment—denial of existence of liability.

"Throughout the period from November, 1938, until July 7, 1941, the said Chickering & Gregory, purporting to act in the name of Anglo National Bank, have practiced active concealment and have made false statements to plaintiff and his counsel for the purpose of leading plaintiff to believe that there is no substantial liability which he can enforce against any of the defendants herein * * * As a result of this concealment and because of the other circumstances above mentioned, plaintiff had no opportunity to discover his cause of action or to enforce the same until a relatively short time before commencement of this action." (47 R. 40-41.)

Manner in which causes of action were discovered.

The complaint of Denicke shows:

1. That a copy of the consolidation agreement was obtained in December, 1938; that this disclosed nothing to indicate the liability (47 R. 41, Par. XXVII.)

2. That William A. Doble, the husband of appellant Mary E. Doble, tried to get information about the special trust for shareholders of The Anglo & London Paris National Bank in March, 1939; that there was no disclosure at that time (47 R. 41-42).

3. That in August, 1940, Denicke requested a certified public accountant to calculate the shrinkage which occurred in the balance sheet of the present bank during

the recapitalization completed in December, 1938; that it was found possible to compare balance sheets and determine therefrom write-offs amounting to about $11,000,000 (47 R. 42).

4. That thereafter Denicke requested his accountant to make a similar calculation from balance sheets of the constituent banks before the merger of June 30, 1932, and that he determined therefrom that the condition statement of The Anglo & London Paris National Bank was false by at least $6,500,000 (47 R. 43).

5. That Denicke then requested his attorney to make an examination of the law to ascertain whether he had any legal remedy under this set of facts (47 R. 43).

6. That he was advised by counsel that an action would lie; that his first report in the matter was rendered about October, 1940; that the bank hampered an investigation that was taken up in support of this claim (47 R. 43).

7. That the delay which occurred between this time and the date of filing suit (August 7, 1941) was the result of negotiations conducted in an effort to dispose of these claims without litigation (47 R. 43-44).

8. That Denicke did not obtain a copy of the Mortimer Fleishhacker letter which was attached to the amended complaint as Exhibit "B" until after suit was filed (47 R. 43).

The allegations in the Doble complaint are not identical. The general condition resulting from the hostility

of the bank management applies. Mr. Denicke communicated the result of his investigations to Mrs. Doble on August 4, 1941 (48 R. 25).

Fiduciary obligations of defendants.

There was a fiduciary obligation owing to appellants from these defendants. This is a further fact to suspend the running of the statute. In the Denicke case there was a joinder of directors in both of the constituent banks (47 R. 21-23). Those who served in Anglo California Trust Company were under a direct obligation because of their status as representatives of the stockholders. The directors in the other bank were promoters of the consolidation. The complaint charges conspiracy. These defendants were all trustees so far as Mr. Denicke is concerned. There is one defendant, Joseph Haber, Jr., who was not an officer of either bank. Mr. Haber prepared the consolidation agreement and other papers used to defraud shareholders of their redemption rights. His employment as counsel for these banks presumed a fiduciary duty to the stockholders, whom he was supposed to protect. Jurisdiction exists as to defendant Haber because it is a part of a controversy arising under federal law.

The defendants in the Doble case were all directors of the Anglo & London Paris National Bank (48 R. 4-5). Mrs. Doble held shares in that bank. The trust relationship is clear.

Common law liability in addition to case arising under federal law.

There is a liability for fraud and deceit on this set of facts in addition to the liability which arises under federal statute. Appellants had the right to reserve this cause of action in their pleading. The Denicke complaint contains the following allegations for that purpose:

> "The construction which plaintiff relies upon in asserting liability under each of the counts of this amended complaint are asserted in good faith, upon the advice of counsel, and in the exercise of the bona fide belief that the same are well founded both in law and in fact, and that such liabilities are created in his favor by the statutes and constitutional provisions cited.
>
> "In asserting such liability, plaintiff reserves such rights as may be available to him at common law in the trial of any and all other issues and facts over which the Court may have jurisdiction as an incident to its power to try and determine the federal causes of action which are the foundation of this suit." (47 R. 35-36.)

QUESTIONS INVOLVED—HOW RAISED.

These are appeals from judgments of dismissal entered on the alleged ground of a want of federal jurisdiction. The court refused to take jurisdiction because of the lack of a statute expressly conferring it in this particular type of suit.

The causes of action are created by federal statute (12 USCA 93 and 501a). The duties violated are also imposed

by act of Congress (12 USCA 34a, 161 and 324). In addition, the interpretation of federal law is necessarily involved.

It is only necessary to examine the opinion to discover that the court devoted attention almost entirely to an effort to determine whether these particular statutes create a liability, as appellants insist that they do—or whether the conduct of defendants was within the law, as claimed. There was undoubtedly a controversy.

The District Court improperly decided the federal questions adversely to appellants, and declined to determine the other questions. In consequence, there has been a miscarriage of justice.

The lower court seems to have been influenced mainly by the fact that the Comptroller of the Currency approved the consolidation. This has no bearing on the question whether the rights of minority stockholders were violated, or whether directors are liable for such violation.

Our pleadings contain a copy of the consolidation agreement and other literature sent to stockholders in connection with the plan. The District Court ignored our argument and declined to interpret these instruments.

The jurisdictional facts are set forth in the following documents of record:

1. Amended complaint of Ernest H. Denicke (47 R. 4-66).

2. Amended complaint of Mary E. Doble (48 R. 3-28).

3. Minute order of Jan. 12, 1942, entered in Doble case granting motion to amend (48 R. 70-71).

4. Affidavit in support of Doble complaint, accepted as an amendment thereto by minute order of Jan. 12, 1942 (48 R. 44-67).

5. Supplemental affidavit lodged in Doble case to verify complaint and support showing of good faith (48 R. 72-75).

Motions to dismiss. The jurisdiction was attacked in a series of motions. These also raised objections going to the merits. We have printed all motions on file in order that this court may determine the entire controversy.[13]

Denial of jurisdiction. The proceedings terminated by orders granting motions to dismiss. See

Denicke case—Order of Dismissal (R. 97), and Minute Order at R. 98;

Doble case—Decision and Order of Dismissal (R. 76), and Minute Order at R. 77.

JOINT SPECIFICATIONS OF ERROR.

Ernest H. Denicke and Mary E. Doble, and each of them, hereby specify the following errors in support of their respective appeals herein.

---

[13]In the Denicke suit motions filed by Mortimer Fleishhacker (R. 74), Joseph Haber, Jr. (R. 68); Walter A. Haas (R. 70); Walter E. Buck (R. 73); Wm. B. Reis (R. 76); Samuel Kahn (R. 77); Joseph O. Tobin (R. 79); Alfred B. Swinerton (R. 80); R. D. Brigham (R. 82); Herbert Fleishhacker (R. 83); R. Stanley Dollar (R. 84); Wm. F. Humphrey (R. 85); and Leon Sloss, Jr. (R. 86).

In the Doble case motions filed by Mortimer Fleishhacker (R. 40); Herbert Fleishhacker (R. 30); Joseph O. Tobin (R. 33); Walter E. Buck (R. 35); Alfred B. Swinerton (R. 37); Walter A. Haas (R. 38); R. Stanley Dollar (R. 42); Wm. F. Humphrey (R. 43).

1. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the first counts in the complaints of appellants herein, for the following reasons:

(a) Said counts plead a cause of action created by federal statute, to-wit: 12 USCA 93, under which officers and directors of national banks are made liable for the violation of 12 USCA 34a, which is a provision of the National Bank Act.

(b) Said counts plead a cause of action for damages resulting from the violation of a duty created by statute, to-wit, by 12 USCA 34a, which is the act under which the consolidation herein was accomplished. Said cause of action arises under federal law because the duty violated is one imposed by an act of Congress.

(c) Said counts plead in good faith a cause of action which can not be decided without the construction and interpretation of federal statutes, viz.: 12 USCA Secs. 34a and 93. There is jurisdiction regardless of whether the court may interpret these statutes in favor of appellants or in favor of appellees when the action is determined on the merits.

2. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the second counts in the complaints of appellants herein, for the following reasons:

(a) Said counts plead in good faith a cause of action which can not be decided without the construction and interpretation of 12 USCA 34a with the due process clause of the Fifth Amendment. There is jurisdiction of that controversy irrespective of how said question may be decided on the merits.

(b) Said counts plead a cause of action for damages resulting from the violation of a duty created by statute, to-wit, by 12 USCA 34a as construed with the due process clause of the Fifth Amendment. Such cause of action arises under federal law because the duty is one imposed by an act of Congress.

3. The District Court committed error in refusing to retain jurisdiction of the causes of action set forth in the first and second counts of said complaint, for the purpose of deciding the non-federal questions presented therein—there being jurisdiction to pronounce judgment upon such issues because of the federal questions disclosed in the record.

ADDITIONAL SPECIFICATIONS OF ERROR ON BEHALF OF ERNEST H. DENICKE.

Ernest H. Denicke specifies additional error in support of his appeal as follows:

4. The District Court committed error in refusing to retain jurisdiction of the cause of action set forth in the third count of the complaint of said appellant for the following reasons:

(a) Said count pleads a cause of action created by federal statutes, to-wit: 12 USCA Secs. 93 and 501a, under which officers and directors of national banks and member banks of the Federal Reserve System are made liable for the violation of 12 USCA Secs. 161 and 324.

(b) Said count pleads a cause of action for damages resulting from the violation of duties created by statute, to-wit, by 12 USCA Secs. 161 and 324.

Said cause of action arises under federal law because the duties violated are imposed by acts of Congress.

(c) Said count pleads in good faith a cause of action which can not be decided without the construction and interpretation of federal statutes, viz.: 12 USCA Secs. 93, 161, 324 and 501a. There is jurisdiction regardless of whether the court may interpret these statutes in favor of appellant Denicke, or in favor of appellees when the action is determined on the merits.

5. The District Court committed error in refusing to retain jurisdiction of the cause of action set forth in the third count of the complaint of said appellant, for the purpose of deciding the non-federal questions disclosed therein—jurisdiction to pronounce judgment in that respect being granted by virtue of the federal questions involved in the same controversy.

OUTLINE OF ARGUMENT.

We have included a detailed outline of the pleadings in our statement of facts in order that the court may understand the theory of liability to support jurisdiction. It will be possible to limit the argument to a discussion of general principles.

1. The District Court has jurisdiction of all controversies arising under federal law in view of 28 USCA 41(1). It is unnecessary to support the jurisdiction by a specific act conferring power to try a particular type of case.

2. A suit arises under federal law whenever the liability to be enforced is created by an act of Congress.

3. There is a federal question whenever a cause of action pleaded involves the violation of a duty created by a federal statute. It is unnecessary for such a statute to include penalties. The fact that the duty arises under the statute and is created by it, is sufficient to support jurisdiction.

4. A case arises under federal law where the interpretation of an act of Congress, or a provision of the federal constitution is necessarily involved. Jurisdiction on this ground does not depend upon the outcome. It is sufficient to show that a decision on a point of federal law will be necessarily involved.

5. The existence of these questions gave the District Court general jurisdiction to decide everything, including the non-federal questions apparent on the face of the record. It is the duty of this court to determine the whole controversy on appeal.

We intend to present our case by discussing these principles in the order mentioned.

General jurisdiction of District Court.

The power to decide controversies arising under federal law is granted by Section 2 of Article III of the Constitution.

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States * * *"

Congress has executed this grant of power by including it as a ground to support original jurisdiction in the District Court. 28 USCA 41(1) provides:

> "The district courts shall have original jurisdiction as follows:
>
> "* * * Of all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and (a) arises under the Constitution or laws of the United States, or treaties made, or which shall be made under their authority * * *"

There are other provisions in 12 USCA 41 conferring jurisdiction over particular matters regardless of the amount in controversy. We have quoted the part of this act which constitutes the general grant of power.

The following statement appears in the opinion of the District Court:

> "A number of the sections of the United States Code, dealing with the subject matter of National banks, make special provision for suits in Federal Courts. There is no such provision respecting a suit, such as here under consideration, where the complaint is based on alleged conspiracy on the part of directors to publish a false report of the condition of one of the banks to be consolidated * * * Where a shareholder seeks to recover damages as a result of such alleged fraudulent action, jurisdiction of a court to determine the same, whether Federal or State, is controlled by the provisions of the statutes respecting diversity of citizenship and the amount involved." (47 R. 96.)

This statement is wholly at variance with the decisions. The Supreme Court has sustained jurisdiction of suits

arising under the National Bank Act, without reference to any clause in that act conferring jurisdiction in any particular type of case. See

Chesbrough v. Woodworth, 244 U.S. 72.

This was a suit for damages resulting from the publication of a false condition report of a national bank in violation of 12 USCA 161—the identical statute involved in the third count of the Denicke complaint. There was also a liability for the declaration of illegal dividends contrary to 12 USCA 60 and for the illegal withdrawal of capital in violation of 12 USCA 56. The directors were charged under 12 USCA 93. This is the general provision in the National Bank Act imposing liability for the violation of any of its terms. It provides:

> "* * * in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation."

These sections of Title 12 U. S. Code contain no provision to specify what court shall have jurisdiction over violations. 12 USCA 93, the section imposing liability, is also silent on that point.[15]

---

[15]12 USCA 93 contains a clause specifying that any action to forfeit the charter of a national bank must be determined by a federal court in an action for that purpose brought by the Comptroller of the Currency. There is no other reference to jurisdictional matters. Clearly, the federal and state courts have concurrent jurisdiction over other violations of the act, and a plaintiff has a right to elect by filing in the District Court, and a defendant has a corresponding right to remove the action to the federal court on the ground that the case arises under federal law.

Congress left the question of jurisdiction out of these statutes, as it has done in many other cases, because there is a general grant of power to the District Court under 28 USCA 41(1). In *Chesbrough v. Woodworth* jurisdiction was sustained on that ground. The court said:

> "But it is urged that the plaintiff brought this action under Section 5239, Rev. Stats.,[16] in the Circuit Court of the United States for the Eastern District of Michigan, in which all of the parties resided, and that not that court but the state court had jurisdiction * * *
>
> "This section was considered in Yates v. Jones National Bank, 206 U.S. 158, 179, and it was held that the rule expressed by it is exclusive and precludes a common law liability for fraud and deceit. To the same effect are Thomas v. Taylor, 224 U.S. 73, and Jones National Bank v. Yates, 240 U.S. 541. *Necessarily a federal question is involved and there was jurisdiction in the courts below.*"

A cause of action created by a federal statute.

One type of case within Federal jurisdiction arises where the statute itself *creates* a cause of action, declaring in specific terms "that certain persons *shall be liable* * * *" We have that situation in the case at bar. Damages are claimed under 12 USCA 93, this provides:

> "* * * in cases of such violation (of the National Bank Act), every director who participated in or assented to the same ***shall be held liable in his personal and individual capacity*** for all damages * * *."

---

[16]This section of the revised statutes is the provision which now appears in the United States Code as 12 USCA 93.

Here the jurisdiction cannot be in doubt because *the cause of action itself* is created by a federal statute. Cases arising under the National Banking Laws are recognized as within the original jurisdiction of the District Court. See

Wyman v. Wallace, 201 U. S. 230.

This was a suit to enforce stockholder's liability under 12 USCA 63, providing:

> "The shareholders of every national banking association *shall be held individually responsible* for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein * * *."

There was no provision *expressly conferring federal jurisdiction of an action to enforce its provisions.* Nevertheless, the Supreme Court held that the District Court had the power to try a case arising thereunder. At 201 U. S. 241, the court said:

> "The case presented was one arising under the laws of the United States. *It was a suit to enforce a special right given by those laws.* Section 5220, Stats. * * * (permits voluntary liquidation).
>
> "By Section 5151 Rev. Stats. stockholders in national banks are made liable for all contracts, debts * * *.
>
> "*In proceeding, therefore, by this suit to enforce* in behalf of himself and all other creditors of the American Bank *the extra liability imposed by Rev. Stats., Sec. 5151, a case was presented arising under the laws of the United States, and of which, independently of the matter of diverse citizenship, the Circuit Court had jurisdiction.*"

Under federal law, national banks are required to publish true statements of their condition.[17] Where one is injured by the publication of a false report, officers and directors are liable. The Supreme Court has sustained federal jurisdiction in such a proceeding.[18] See

Jones National Bank v. Yates, 240 U. S. 541 at 550.

At 240 U. S. 550, the court said:

> "It is insisted that the writs should be dismissed in the view that the plaintiffs in error sought to enforce liability upon non-Federal grounds and that the Federal question was raised exclusively by the defendants in error. But this objection ignores the nature of the plaintiffs' case. The fact that their petitions did not refer in terms to the Federal statute is not controlling. Thomas v. Taylor, 224 U. S. 73, 78, 79; Grand Trunk Rwy. v. Lindsay, 233 U. S. 42, 48. It was alleged that statements published by the defendants, acting as directors and officers of the bank,

---

[17]12 USCA 161:

"Every association shall make to the Comptroller of the Currency not less than three reports during each year, according to the form which may be prescribed by him, verified by the oath * * * of the president, or of the cashier * * * (or other officer designated) * * *

"Each such report shall exhibit, in detail under appropriate heads, the resources and liabilities of the association * * * and shall be transmitted to the Comptroller * * * and the statement of resources and liabilities, together with acknowledgment and attestation in the same form in which it is made to the Comptroller, ***shall be published in a newspaper published in the place where such association is established*** * * *"

[18]The liability for violation of 12 USCA 161 is created by 12 USCA 93. The court will observe the method of arrangement adopted by Congress in the National Bank Act and Federal Reserve Act (Chapters 2 and 3 of Title 12). There is one section creating liability in each act, phrased to cover any and all violations thereof. See 12 USCA 93 and 501a.

with respect to its financial condition, were false, and were known to be false * * *.

"*The conclusion of the trial court that there could be a recovery at common law, independent of the federal statute, did not alter the inherent character of the actions* * * *. Although the defendants alleged in their answers that if any liability attached to them as directors it was determined by the federal act, the construction of which was necessarily involved, this was not properly speaking a matter of affirmative defense * * *. We conclude that this court has jurisdiction."

See

Benton v. Deininger, 21 Fed. (2d) 657,

where a complaint based on a false condition report was sustained under this section (12 USCA 161). See also

Bailey v. Mosher, 63 Fed. 488,

holding that an action under this statute, filed in a state court might be removed and tried in the federal court.

A duty imposed by a federal statute.

There is a second type of case—one where the cause of action is not created in express terms by statute, but there is *a duty imposed by some term of a statute,* and *a violation of such duty* is charged. Such statute is involved in the litigation as one of the elements necessary to establish a tort.

A cause of action in tort requires proof of a duty owing to the injured party, a violation of that duty, and proof of damage. ***Each of these elements is an essential ingredient.***

The duty owing to the injured party may arise at common law or it may be one imposed by a statute. If it is founded upon a statute, the cause of action arises under that statute.

See

Corpus Juris Secundum, Volume 1, "Actions", at page 990:

"A right of action under a statute which supersedes the common law is strictly a statutory right of action, although the same facts would have constituted a right of action under prior common-law principles * * *.

"It is a general rule that, where a statute imposes a duty for the benefit or protection of particular individuals or classes of individuals, a violation of such duty gives a right of action to any person for whose benefit or protection the statute was enacted, for any damages he has sustained thereby * * * as against the person guilty of the violation * * * and also applies although the statute which imposes the duty does not in terms create a right of action, or prescribe any remedy for its enforcement or violation * * *."

In the District Court, defendants claimed that 12 USCA 34a is not a part of the National Bank Act. It was suggested that the committee appointed to frame the United States Code made an error in classification. From this premise counsel argue that 12 USCA 93 does not impose a liability for a violation of 12 USCA 34a. We are satisfied that this contention is without merit. It is certainly immaterial. It is only necessary for us to show that a duty imposed by 12 USCA 34a was violated. The violation of any term of that section raises a federal question.

An action can be maintained for the violation of a duty imposed by federal statute, even though such act contains no clause providing a penalty. See

Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, at pages 39, 40.

This was a suit for damages based upon a violation of a term in the Interstate Commerce Act requiring the maintenance of safety appliances on railway cars. At 241 U. S. 39-40, the court said:

> "None of the acts, indeed, contains express language conferring a right of action for the death or injury of an employee; but the safety of employees and travelers is their principal object, and the right of private action by an injured employee, even without the Employers' Liability Act has never been doubted. (See Johnson v. Southern Pacific Co., 196 U. S. 1; Schlemmer v. Buffalo, Rochester etc. Ry. 205 U. S. 1, 8; * * *. *A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover* the damages from the party in default *is implied*, according to a doctrine of the common law expressed in 1 Com. Dig. Tit. Action upon Statute (F), in these words: 'So, in every case, where a statute enacts, or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law.' * * *
>
> "Plaintiff's injury was directly attributable to a defect in an appliance which by the 1910 Amendment was required to be secure, and the act must therefore be deemed to create a liability in his favor, unless it be beyond the power of Congress under the Com-

merce Clause of the Constitution to create such a liability in favor of one not employed in Interstate Commerce."

See also

Texas & New Orleans RR Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U. S. 548 at 569:

This was an action based upon violation of a duty imposed by the Railway Labor Act of 1926. At 281 U. S. 569, the court said:

> "*The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties.* Many rights are enforced for which no statutory penalties are provided. In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards * * * but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each * * *."

Suits to enforce compliance with duties imposed by act of Congress, and actions for damages resulting from the violation of duties created by such acts are recognized as within the jurisdiction of the federal courts. See

Macon Grocery Co. v. Atlantic Coast Line Railroad Co., 215 U. S. 501.

This was a suit to enjoin the violation of duties imposed by the Interstate Commerce Laws. It was held that the action was within the jurisdiction of the District Court. At 215 U. S. 507, the court said:

> "Cases arising under the laws of the United States are such as grow out of the legislation of Congress,

whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const. Sec. 1657. It was said in Osborne v. Bank (9 Wheat. 738), '*When a question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause,* it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.' And *a case arises under the laws of the United States, when it arises out of the implication of the law.*"

And at 215 U. S. 508 the court said:

"The object of the bill was to enjoin alleged unreasonable rates, threatened to be exacted by carriers subject to the act to regulate commerce. The right to be exempt from such unlawful exactions is one protected by the act in question, and the purpose to avail of the benefit of that act, as well as of the anti-trust act, is plainly indicated by the averments of the bill. *Of necessity, in determining the right to the relief prayed for, a construction of the act to regulate commerce was essentially involved.*"

There is a good statement of the rule in an opinion written by the late Chief Justice Taft while sitting in the Circuit Court in Ohio. See

Toledo etc. Ry. Co. v. Pennsylvania Co., 54 Fed. 730 at 732.

"The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties * * *. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this

court to protect the complainant in rights which it claims under the act of Congress passed February 4, 1887, * * * known as the 'Interstate commerce act' * * *. These acts were passed by Congress * * * to regulate commerce * * *. *Counsel for defendant Arthur contend that the interstate commerce law and its amendments are only declaratory of the common law,* which gave the same rights to complainant, and that, therefore, this is not a case of federal jurisdiction * * *. *It is immaterial what rights the complaint would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States.''*

The interpretation of a federal statute.

There is a third type of case where a suit filed in a District Court *will necessarily involve the construction or interpretation of an act of Congress.* In a sense, there is an overlap between this situation and the one involving the violation of a duty created by federal law. There is one difference. Jurisdiction exists where it is necessary to construe a federal law, even though, after such construction, *the court may decide that no duty has been imposed.* In short, the jurisdiction does not depend on the outcome of the litigation. It is only necessary to show that the plaintiff has, in good faith, brought a suit where it is necessary to interpret a federal act in order to adjudicate his rights. This theory of jurisdiction takes us back to the principles expressed by Chief Justice Marshall in

Cohens v. Virginia, 6 Wheat. (19 U. S.) 264 at 376-378.

"Jurisdiction is given to the courts of the Union, in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends 'all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority' * * *. If it be, to maintain that a case arising under the constitution, or a law, must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think, the construction too narrow. *A case in law or equity consists of the right of the one party, as well as of the other, and may be truly said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either.*"

This theory of jurisdiction was discussed in a decision by the late Justice Cardozo. See

Gully v. First National Bank, 299 U. S. 109,

where suit was removed to a federal court because of the alleged need for interpretation of a federal statute. Although the jurisdiction was declined, the opinion shows where the line should properly be drawn. The suit was for recovery of taxes levied by a state, against a national bank located in such state. Congress had given general consent to the levy of such taxes by 12 USCA 548. There was no evidence of any dispute involving the meaning of this section—no indication that there would be *any actual occasion* for its interpretation. The court made this observation in the opinion:

> "The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. *The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it* * * *."

In the case at bar we have, of course, a direct charge of the violation of a federal statute—and a claim for damages based upon such violation. The opinion of Justice Cardozo leaves no doubt as to the jurisdiction of such a case:

> "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action * * *. *The right of immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another* * * *." (299 U. S. 112.)

There are many cases where jurisdiction is recognized because of the necessity of construing a federal statute. See

California Bank v. Kennedy, 167 U. S. 362,

a suit to enforce stockholders' liability in a state bank. One of the defendants was a national bank. There was doubt whether a national association could legally acquire stock in a state bank. There was also doubt as to whether it could be held liable as a shareholder in case such stock was acquired. The decision of that question required an interpretation of federal laws governing its corporate powers. The suit originated in the Superior Court of San Diego County. Thereafter judgment was

reviewed by the Supreme Court of California. The Supreme Court of the United States took the case on writ of error. Such review was sustained because of the federal questions. At 167 U. S. 365-366, the court said:

> "In view of the fact that the defendant was a national bank, deriving its powers from the statutes of the United States, the averment that a particular transaction of the character of the one in question * * * was without authority of law, can, in reason, be construed only to relate to the law controlling and governing the conduct of the corporation, that is, the law of the United States * * *.
>
> "The suggestion as to the want of jurisdiction is, therefore, without merit.
>
> "The federal questions which therefore arise on the record may be thus stated: 1st, do the statutes of the United States * * * relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock of another corporation? And, 2d, if a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?"

There is no difference between the grant of jurisdiction to the Supreme Court under Article III, section 2 of the Constitution, and the power conferred upon a District Court by 28 USCA 41(1) in respect to matters which "arise under the Constitution or laws of the United States".

It has been held that a suit to enforce rights arising from a regulation of a federal reserve bank is within the original jurisdiction of a District Court. See

Federal Reserve Bank of Atlanta v. Atlanta Trust Co., 91 Fed. (2d) 283, 285,

where the court said:

> "* * * the petition declared upon and seeks to enforce rights growing out of a Federal Reserve Bank Regulation promulgated under the authority of federal law. *Such a suit, in the strictest sense, is one arising under the constitution and laws of the United States.*" (91 Fed. (2d) 285.)

Where jurisdiction is acquired because of the necessity of construing or interpreting a federal statute, it *necessarily includes the power to decide that question in favor of either the plaintiff or the defendant.* It may well be that a plaintiff will fail to convince the court or obtain an interpretation of the federal law which will be in his favor. Or, it may be that the defendant will fail in that respect, and that the court will find that the statute prohibits the conduct drawn into question. Jurisdiction includes the power to render a judgment. Necessarily, in this type of case, it cannot be made to depend on the outcome. See

Siler v. Louisville & Nashville RR Co., 213 U. S. 175 at 191,

where the court said:

> "The federal questions, as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the federal questions adversely to the party raising them, or even if it

omitted to decide them at all, but decided the case on local or state questions only.

"This court had the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the federal questions, or decide them adversely to the party claiming their benefit."

See also:

The Fair v. Kohler Die Company, 228 U. S. 22, at page 25,

where the court said:

"Of course the party who brings a suit is master to decide what law he will rely upon and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States. That question cannot depend upon the answer * * * Conversely, when the plaintiff bases his cause of action upon an act of Congress jurisdiction cannot be defeated by a plea denying the merits of the claim * * * We are speaking of a case where jurisdiction is incident to a federal statutory cause of action. *Jurisdiction is authority to decide the case either way. Unsuccessful as well as successful suits may be brought upon the act, and a decision that a patent is bad, whether on the facts or the law, is as binding as one that is good.* See Fauntleroy v. Lum, 210 U. S. 230, 235. No doubt if it should appear that the plaintiff was not really relying upon the patent law for his alleged rights, or if the claim of right were frivolous, the case might be dismissed. In the former instance the suit would not really and substantially involve a controversy within the jurisdiction of the court, Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282, 287, 288, and in the

latter the jurisdiction would not be denied, except possibly in form. Deming v. Carlisle Packing Co., 226 U. S. 102, 109. *But if the plaintiff really makes a substantial claim under an act of Congress there is jurisdiction whether the claim ultimately be held good or bad.*"

See also:

Portland Railway Co. v. City of Portland, 210 Fed. 667;

Benedict v. City of New York, 247 Fed. 758;

Freiburg Company v. Dawson, 274 Fed. 420;

Baldwin v. Chicago & Northwestern Railway Co., 86 Fed. 167, at 178.

There is a good summary of the rule in:

Chicago Life Insurance Co. v. Needles, 113 U. S. 574, at 579:

"And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

THE RECORD DISCLOSES THAT THE INTERPRETATION OF FEDERAL STATUTES WILL BE NECESSARILY INVOLVED.

All three counts state causes of action which cannot be decided without the interpretation of acts of Congress. The statutes involved are 12 USCA sections 34a, 93, 161, 324, and 501a. The following problems of interpretation are also involved:

1. Whether the Comptroller of the Currency has the power to validate or approve a consolidation agreement so as to validate any infringement of the rights of minority stockholders contained therein.

2. What, if any, presumption of validity, will attach to any such contract because of the fact that it may have been submitted to the Comptroller or considered by him before its execution.

3. Whether 12 USCA 34a is a part of the National Bank Act—whether the committee which drew up the United States Code properly classified the act of February 25, 1927, Chapter 191, 44 Stats. 1225, which was re-enacted as section 34a of Title 12, U. S. Code, making it one of the provisions of the National Bank Act. (That act now appears as Chapter 2 of Title 12.)

4. Whether the general provisions for liability established by 12 USCA 93 apply to a violation of 12 USCA 34a.

The complaints show that all questions involving interpretation of federal law are raised in good faith. We quote the following from the Denicke record:

> "The determination of this action necessarily requires the construction and interpretation of 12 U. S. Code sec. 34a, and the application thereof to the case at bar, in the light of the requirements of due process of law guaranteed to plaintiff under the Fifth Amendment to the Constitution of the United States" (47 R. 33-34).
>
> "As a part of his theory to sustain relief herein, plaintiff contends that said section 34a prohibits the performance of each of the acts and things mentioned * * *" (47 R. 34).

"Defendants, and each of them, rely upon interpretations of these provisions of law which are controverted by plaintiff. An actual controversy exists with respect to the same. The construction relied upon by plaintiff will sustain his cause of action. That which will be urged by defendants will have the effect of diminishing and denying the existence of such claim. The cause of action and a proper determination thereof directly depends upon this fact" (47 R. 35).

"There is no decision of any court of last resort determining the issues raised in this respect and the controversy is therefore actual with respect to each ground relied upon by plaintiff" (47 R. 35).

"The construction which plaintiff relies upon in asserting liability under each of the counts of this complaint is asserted in good faith, upon the advice of counsel, and in the exercise of the bona fide belief that the same is well founded both in law and in fact, and that such liabilities are created in his favor by the statutes and constitutional provisions cited" (47 R. 35-36).

MISCARRIAGE OF JUSTICE RESULTING FROM FAILURE OF THE DISTRICT COURT TO TAKE JURISDICTION OF ALL QUESTIONS DISCLOSED BY THE PLEADINGS.

There can be no reasonable doubt as to jurisdiction. We have shown three independent theories binding upon the District Court. There has been an arbitrary refusal to exercise a jurisdiction which the Constitution and the federal statutes establish. The court failed to perform the duty enjoined by the decisions of the Supreme Court in:

Siler v. Louisville & Nashville RR Co., 213 U. S. 175, at 191;

The Fair v. Kohler Die Company, 228 U. S. 22, at 25;

Chicago Life Insurance Co. v. Needles, 113 U. S. 574, at 579.

It refused to pass upon all questions presented. It arbitrarily declined to determine the common law liability of defendants arising from the set of facts pleaded. We disagree with the conclusions announced upon the matters of federal law, and we are appealing therefrom. However, we have a constitutional right to have the common law issues decided also, because they are a part of the same case—a case which was within the jurisdiction of the District Court.

There has been a miscarriage of justice. If we are now compelled to file new suits in the state courts, defendants will undoubtedly plead the Statute of Limitations. They may be successful in this. Three years from date of discovery may well elapse before the present matters can be determined on appeal.

Defendants will very likely insist that the District Court disposed of the merits. It was under a duty to do so. It failed to perform that duty. Actually it decided the federal questions adversely to appellants, and declined to decide anything else.

On appeal we ask this court to perform the duty which should have been discharged by the district. We request that the following relief be granted:

1. Issuance of a mandate sustaining jurisdiction of the District Court with respect to all questions of federal and state law disclosed by the pleadings;

2. A determination that each count in these pleadings states a good cause of action for damages in violation of federal law;

3. A determination that said counts also state a cause of action for fraud and deceit, independently of the violations of federal statute charged therein;

4. Provisions in the mandate instructing the District Court to deny with prejudice each of the motions to dismiss that are of record here, on the ground that none of them are well taken in view of the allegations set up in the pleadings.

There can be no advantage in limiting the decision to the narrow issue of jurisdiction. It is a part of our burden to show that the judgment is in fact erroneous. We propose to do so by establishing the fact that good causes of action, federal and also non-federal, are stated therein; that the District Court had jurisdiction over both. This Court has all the motions before it. Therefore it is in a position to act. The cause should be remanded in a form which will require defendants to answer. We are in a position to settle the pleadings now. Furthermore, it will aid the lower court to have the benefit of an opinion indicating the theories of liability that are available upon the set of facts pleaded.

CAUSE OF ACTION FOR FRAUD—ASIDE FROM VIOLATIONS OF STATUTES.

We think that the statutes have been directly violated. However, it is unnecessary to sustain the case solely on that ground. These defendants are bank directors. There

was a fiduciary obligation owing from them to Mr. Denicke and Mrs. Doble at the time of the consolidation. See:

Kavanaugh v. Kavanaugh Knitting Co., 123 NE 148, at 151, 226 NY 185,

where the court said:

> "The ordinary trust relation of the directors to the corporation and stockholders is not a matter of statutory law or of technical law. *It springs from the fact that the directors have the control and guidance of the corporate business affairs, and property, and hence of the property interests of the stockholders* * * *
>
> "The relation of the directors to the stockholders is essentially that of trustee and cestui que trust. *The directors are bound by all those rules of conscientiousness, fairness, morality, and honesty in purpose which the law imposes as the guidance for those who are under fiduciary obligations and responsibilities.*"

In the case of a bank director, the relationship is fiduciary in the strictest sense. See:

Fleishhacker v. Blum, 109 Fed. (2d) 543.

Where persons stand in a confidential relationship, suppression of the truth constitutes fraud. One in that position is under a positive duty to speak. Silence on his part is fraud. See:

Civil Code section 1710, sub. 3:

> "A deceit, within the meaning of the last section, is * * * the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact."

The following cases sustain liability for fraud resulting from silence on the part of a fiduciary:

McDonald v. DeFremery, 168 Cal. 189, at page 203;

Copper Process Co. v. Chicago Bonding & Insurance Co., 262 Fed. 66, at 73.

The promoters of a consolidation occupy a fiduciary relation to stockholders affected by such a proceeding.

Garrett v. Reid-Cashion Land & Cattle Co., 34 Ariz. 245, 270 Pac. 1044;

Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 199 Fed. 64.

The records in the cases now pending disclose an outrageous violation of confidence on the part of Mortimer and Herbert Fleishhacker and the other directors who participated in this merger. We do not believe that Congress licensed such a betrayal of the interests of stockholders when 12 USCA 34a was adopted. It is clear that the common law will not sanction such conduct. There is a cause of action for fraud in addition to the one arising from violation of federal statute.

Knowledge of law.

The defendants said Mr. Denicke and Mrs. Doble could not have been defrauded *because they were presumed to know the law*—hence, *they must have been aware of their legal rights.* It is impossible to throw this presumption into reverse gear and arrive at such a result.

The so-called presumption that one knows the law is merely another way of saying that ignorance of the law

is not an excuse. This means that one may not avoid the consequences imposed by law by pleading ignorance. *The presumption cannot be used to supply a question of fact* which is a material part of a cause of action.

Appellants have been subjected to the consequences imposed by 12 USCA 34a. They have lost their redemption rights because there was no opportunity to exercise them in time. They are in exactly the same position as one who tries to appeal after the time allowed by law. Their case resembles that of a man who is the victim of a default judgment, or of a failure to redeem from a foreclosure, or of a failure to take any other step which by law must be performed within a specified period of time.

We admit that appellants have been subjected to the consequences of a default. This is an action to enforce liability *against the persons who are responsible for that default.* Where one is fraudulently induced to forfeit his legal rights, the wrongdoer may not defend by setting up a presumption. He cannot prove that the injured party knew the law—*when in fact he did not know anything about it.* There is a good statement of the rule at 22 Corpus Juris, "Evidence", pages 148-149:

> "*Knowledge of law.* All persons are presumed to know the general public laws of the country or state where they reside or do business, as well as the legal meaning of terms employed in establishing legal relations. *Since there is no inference of fact that law is known, the presumption merely expresses the rule that ignorance of law is not an excuse for its violation.*"

See:

Murphy v. Sheftel, 121 Cal. App. 533, 9 Pac. (2d) 568.

This was a suit for damage resulting from the defective construction of a building. It was necessary to determine, as a fact, whether plaintiff had knowledge of the building ordinances. The court held that this fact could not be supplied by reference to any presumption.

> "* * * It was shown that certain of the defects mentioned were violative of a state housing law and the building ordinance of the City of San Francisco; and, in view of the rule that ignorance of the law excuses no one—sometimes stated as a presumption that all persons know the law—and the presumption that the law has been obeyed (Code Civ. Proc. Sec. 1963, sub. 33), it is contended that it must be presumed that plaintiff has knowledge of the statute and ordinance mentioned * * *
>
> "* * * where it is necessary to establish the fact of actual knowledge, affirmative proof to that effect must be introduced, and no assistance in so doing can be derived from the pseudo presumption itself * * *"

See also:

Black v. Ward, 27 Mich. 191, 15 Am. Rep. 162, at pages 169, 170.

This case raised the question whether the payee of a promissory note was presumed to know the technical legal meaning of some terms appearing in it. It was held that actual knowledge of that meaning could not be proved by any presumption. The court said:

> "But the maxim referred to in regard to a knowledge of the law is misapplied. No man can avoid a

liability, as a general thing, because he is ignorant of the law. This is an essential rule of society. But *the law is not so senseless as to make absurd presumptions of fact* * * *

"* * * *There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so.* * * * As to the certainty of the law * * * it would be very hard upon the profession if the law was so certain that everybody knew it; *the misfortune is that it is so uncertain that it costs much money to know what it is,* even in the last resort * * *

"In the present case, we are asked not only to presume conclusively that the maker and endorser of the note in suit knew the law, but also that by inserting expressly what the law would have implied, they must be presumed to have meant something else. This would not be a reasonable presumption."

See also:

Municipal Metallic Bed Mfg. Corp. v. Dobbs, 253 N. Y. 313, 171 N. E. 75, 68, ALR 1376.

This case involves the question whether a tenant had knowledge of statutes and ordinances which were violated by conditions existing on the premises. The court refused to apply a presumption of legal knowledge—this issue was left as one of fact to be established by evidence. At 68 ALR 1378, 1379 the court said:

"It is urged that the tenant is presumed to know the law applicable to the facts, and that therefore it cannot rely on the guaranty as to the law applicable to the use of the building. No presumption exists that all men know the law * * * *If ignorance*

of the law did not in fact, exist, we would not have lawyers to advise and courts to decide what the law is. Everyone would know the law and it would be applied uniformly when the facts were known to the parties. * * *"

Damages for fraudulently inducing a forfeiture of legal rights.

The default, imposed upon Mr. Denicke and Mrs. Doble during the consolidation, made it necessary for them to accept shares of depreciated value in the new bank. They have lost their right to sue the bank for the redemption price. There was no option but to keep what was issued to them. The damage resulting from this fraud is the difference in value between the old stock and the new shares issued in exchange. The value of the old stock is measured by what would have been paid in redemption if there had been a demand in time.

Where a fiduciary induces one to forfeit legal rights by a violation of confidence, an action will lie. The rule applies even though the misrepresentation may consist in a *matter of law* as distinguished from a *question of fact.*

See:

Pomeroy's Equity Jurisprudence, 4th Edition, Vol. 2, page 1711, sec. 841,

as follows:

"Mistake of law may be an ignorance or error with respect to some general rules of the municipal law applicable to all persons * * * On the other hand, the term may mean the ignorance or error of a particular person with respect to his own legal rights and interests which are affected by or which will

result from a certain transaction in which he engages * * * The person about to enter into the transaction may be ignorant of or mistaken about his own antecedent existing legal rights and interests which are to be effected by what he does, although he correctly apprehends and fully understands the legal import of the transaction itself * * * or the person may be correctly informed as to his existing legal rights, interests or relations, and may be ignorant or mistaken with respect to the legal import of the transaction in which he engages, and its legal effect upon those rights, interests or relations."

Where ignorance as to the legal effect of a transaction is induced by inequitable conduct of others, there is a right to relief.

See:

Pomeroy, page 1727, section 847,

as follows:

"Whatever be the effect of a mistake pure and simple, there is no doubt that equitable relief, affirmative or defensive, will be granted *when the ignorance or apprehension of a party* concerning the legal effect of a transaction in which he engages, or concerning his own legal rights which are to be affected, *is induced, procured, aided, or accompanied by inequitable conduct of the other parties* * * * The scope and limitations of this doctrine may be summed up in the proposition that a misapprehension of the law by one party, of which the others are aware at the time of entering into the transaction, but which they do not rectify, is a sufficient ground for equitable relief * * *"

Equity will grant relief where such conduct is charged against a fiduciary.

See:

Pomeroy, page 1729, sec. 848,

as follows:

> "A particular application of the foregoing rule requires a special mention. *Where an ignorance or misapprehension of the law, even without any positive incorrect or misleading words* or incidental acts, *occurs in a transaction concerning the trust between two parties* holding close relations of trust and confidence, *injuriously affecting the one who reposes the confidence, equity will, in general, relieve the one who has been injured.*"

See also:

Rued v. Cooper, 119 Cal. 463,

where a customer of a brokerage firm settled his account in ignorance of the fact that he had been led to participate in margin operations in violation of state law, under which he was entitled to claim reimbursement. Upon discovering the fact he sued and was successful. The defendant claimed that the mistake was one of law —that there was no basis for granting relief. At 119 Cal. 467, 468, the court said:

> "The testimony of Mr. Macomber was that nothing was said at or before the settlement as to his right to recover back the money he had advanced; and it was then sought to be shown that he did not know he had such right. The question put for that purpose was objected to upon the ground that it was immaterial—*that he was presumed to know the law.*
>
> "The discussion of the case by counsel is largely devoted to the question as to whether relief can be granted from such mistake • • •

"As to the general rule that mistake of law, pure and simple, is not adequate ground for relief, there is no controversy; nor is there any serious controversy as to the proposition that there are exceptions to that general rule. *We do not, however, regard this as a mistake of law, pure and simple, but as belonging to a distinct class recognized by law writers of acknowledged ability and sanctioned by numerous decisions.*"

The following cases sustain the right to maintain an action for loss or forfeiture of legal rights:

Goodenow v. Ewer, 16 Cal. 461;

Bowman v. Payne, 55 Cal. App. 789;

Douglass v. Todd, 96 Cal. 655.

Civil Code section 1576 provides "Mistake may be either of fact or law". Section 1578 of that code reads as follows:

"Mistake of law constitutes a mistake, within the meaning of this article, only when it arises from:

"1. A misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law; or,

"2. *A misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify.*"

We have already cited section 1710 of this Code under which the suppression of the truth by a fiduciary is declared to constitute a fraud.

Appellants' claims are not barred by the statute of limitations.

It should be sufficient to submit an outline of the authorities bearing on this question.

These causes of action involve a fraud. The limitation period is, therefore, three years, commencing at date of discovery (CCP 338, sub. 4).

Where an action *involving violation of a statute* charges conduct which amounts to fraud, this section applies.

See:

Fox v. Hale & Norcross Co., 108 Cal. 369, at page 424;

MacDonald v. Reich & Lievre, Inc., 281 Pac. 106, 100 Cal. App. 736.

Where the facts necessary to support a cause of action are suppressed by the wrongdoer, the statute is suspended until discovery.

Kimball v. Pacific Gas & Electric Co., 30 Pac. (2d) 39, 220 Cal. 203.

Effect of the decision in National Supply Company v. Stanford University, 134 Fed. (2d) 689.

At page i of the Appendix, we have included a comparison between the consolidation agreement used by National Supply Company and the one adopted by The Anglo. This court will find a striking difference in the procedures adopted.

The relief sought against National Supply Co. amounted to a rescission. The judgment was for the redemption price. *The corporation was sued. The judgment was payable out of the corporate treasury.* The rights of

other stockholders were involved because of this fact. The investing public had an interest in the subject-matter because the corporate structure was necessarily affected by a demand for payment made after the consolidation had become effective. This court seems to have been influenced by those factors.

In the case at bar, the claims involve no one except the directors who were guilty of fraud. The funds of the bank will not be called upon. It is not a defendant. There is no ground under which it could be joined. No other shareholder is involved. The proceeding is one to compel these directors to do justice. They are sued in an individual capacity.

This court seems also to have been influenced by the fact that Stanford University knew that the plan was unfair. After arriving at such conclusion the representatives of the university failed to act. They were furnished with literature sufficient to put them on inquiry. It was held that their claim was barred by laches.

In the cases at bar, *the plan was represented to be a fair one. Appellants believed at the time that it was equitable.* They were justified in going along with the proposal without further inquiry. Their belief was induced by positive misrepresentations. We have pleaded in detail facts showing suppression of these causes of action. The record discloses conduct sufficient to suspend the statute of limitations.

We understand that this court has left open the question whether a failure to give affirmative notice of redemption rights will support action as against a fiduciary.

The Comptroller of the Currency had no power to sanction or validate the fraud.

The conduct of these parties speaks for itself. It is such that no court should be willing to sanction it. Violations of federal statute, and misconduct at common law are both apparent. There is undoubtedly a cause of action. The District Court seems to have assumed, that all of this was a valid exercise of corporate power, *because the Comptroller of the Currency approved of it.*

We have never heard it suggested that all provisions of a corporate charter are valid because the Secretary of State accepts it for filing. All issues of corporate securities are not beyond the reach of the courts because the Division of Corporations may perform some function at the time of execution. The case of the Comptroller is similar.[19]

The fraudulent letters sent to stockholders by Mortimer and Herbert Fleishhacker do not seem to be among the papers "approved" at the Comptroller's office. If there was any approval of this plan beyond the filing of document etc. it was limited to matters concerning the corporate structure. There was no power to validate a fraud perpetrated against the minority.

Condition of the record as to J. C. McKinstry.

Mr. McKinstry, joined as a defendant in both cases, died while motions to dismiss were under submission in the District Court. He was named as appellee herein. There has been no probate. No appointment of an execu-

---

[19]At page iii of the Appendix we have included a summary of the various statutory provisions governing the duties of the Comptroller of the Currency.

tor or administrator whom we could substitute. Appellants have decided not to institute a proceeding of their own to appoint such a representative. As a result there can be no substitution.

Probably no plea of *res adjudicata* could arise in favor of parties based upon our failure to reverse the judgment as to McKinstry. However, we did not wish to incur that risk. Stipulations, therefore, have been signed with opposing counsel and filed herein to cover the matter.[20] These dispense with the necessity of our acting to make a substitution. The appeal is to be decided against all other parties exactly as it would be determined had McKinstry not been joined in the first place.

The court may act on its own motion in clearing the record, as to McKinstry. Presumably, when mandate is issued the court would either affirm judgment, or dismiss appeal as to McKinstry by a provision separate from the action taken with respect to other parties. We will discuss with counsel and the court, at oral argument, the form of mandate which we protect all parties and carry out the intent of our stipulations.

CONCLUSION.

In cases arising under the National Banking Laws, the state and federal courts have concurrent jurisdiction. A plaintiff may elect to sue in either forum. Similarly, a defendant sued in such a matter in the state court may claim federal jurisdiction by petition for removal.

---

[20]For the convenience of the Court we have printed these stipulations in full at pages xiv and xix, of the Appendix.

The fact that a state court has power to try a case, will not deprive the federal court of its own jurisdiction in the matter.

See:

Home Telephone & Telegraph Co. v. Los Angeles, 227 U. S. 278.

The exercise of jurisdiction is *not a discretion—it is a matter of right.* In support of this fundamental principle we cite the opinion of Chief Justice Marshall in *Cohens v. Virginia*, 19 U. S. (6 Wheat.), 264, at 403:

> "It is most true, that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction, if it should. The judiciary cannot, as the legislature may, avoid a measure, because it approaches the confines of the constitution. We cannot pass it by, because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it is brought before us. *We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.*"

Dated, San Francisco,
September 17, 1943.

Respectfully submitted,
AARON M. SARGENT,
Attorney for Appellants.

(Appendix Follows.)